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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 590

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION AND THE COMMONWEALTH AND SOUTHERN CORPORATION

No. 591

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
PETITIONER

v.

FEDERAL POWER COMMISSION AND SOUTH CAROLINA ELECTRIC & GAS COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AND THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (R.-FPC. 324-330,

R.-SEC. 310-316)[1] is reported at 170 F. 2d 948. The order of the Federal Power Commission (R.-FPC. 2-10) is not yet reported.[2] The findings and opinion of the Securities and Exchange Commission (R.-SEC. 2-25) have not yet been reported but are set forth in Holding Company Act Release No. 8080.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1948 (R.-FPC. 331, R.-SEC. 317). By an order of the Chief Justice dated January 25, 1949, the time for filing a petition for writs of certiorari was extended to and including February 23, 1949 (R.-FPC. 333, R.-SEC. 319). The petition for writs of certiorari was filed on February 23, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 313(b) of the Federal Power Act, and Section 24(a) of the Public Utility Holding Company Act of 1935.

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[1] The form of reference to the records in these two cases, adopted by the petitioner (Pet. 2, note 3), will be followed in this brief.

[2] With the consent of the court below, the record certified to it by the Federal Power Commission incorporated by reference the proceedings before the Securities and Exchange Commission and the Public Service Commission of South Carolina (R.-FPC. 296-297). The entire transcript so certified is on file with the Clerk of this Court but, by stipulation of the parties, the printed record in this Court consists solely of the appendices to the briefs of the parties in the court below. The record before this Court in No. 590, the SEC case, contains all of these materials.

QUESTIONS PRESENTED

The Securities and Exchange Commission ordered the Commonwealth and Southern Corporation to divest itself of the ownership of the stock of the South Carolina Power Company. South Carolina Electric and Gas Company offered to buy the Power Company stock and the South Carolina Public Service Authority made a higher offer but one which was dependent on a judicial determination of its power to make such a purchase. Commonwealth and Southern decided to accept the Electric & Gas Company's offer. It applied for the approval of the Securities and Exchange Commission and the Electric & Gas Company applied for that of the Federal Power Commission. The questions presented are:

1. Whether it was within the discretion of the Securities and Exchange Commission, under Sections 11(e) and 12(d) of the Public Utility Holding Company Act, to approve the proposed disposition of the Power Company stock to the Electric & Gas Company.

2. Whether the Federal Power Commission, under Section 203(a) of the Federal Power Act, properly approved, as "consistent with the public interest", the acquisition by the Electric & Gas Company of the Power Company stock.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, as amended by 49 Stat. 838, 16

U.S.C. 791a-825r, and of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79, *et seq.* are set forth in the Appendix, *infra*, pp. 20-28. S.E.C. Rules U-44 and U-50 are also set forth in the Appendix, *infra*, pp. 28-29.

STATEMENT

On August 1, 1947, the Securities and Exchange Commission, acting under Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(1) ordered the Commonwealth and Southern Corporation (Commonwealth), a registered public utility holding company under that Act, to divest itself of the ownership of the stock of South Carolina Power Company (Power) (R.-SEC. 6, 4). In accordance with that order, and after information that Commonwealth proposed to sell these properties in compliance with the SEC order had been widely disseminated (R.-SEC. 162, 172), Commonwealth negotiated for the sale of Power stock with two prospective purchasers operating in South Carolina, *i.e.*, South Carolina Public Service Authority (Authority), petitioner herein, a quasi-public corporation of that State,[3] and South Carolina Electric & Gas Company (Electric & Gas), a privately owned public utility. Only the Authority

[3] Authority was created by Act No. 887 of the Acts of the General Assembly of South Carolina for 1934 (38 S. C. Stat. at Large, p. 1507; Secs. 8555-11 through 8555-24, Chapter 163-B, Code of Laws of South Carolina, 1942) set out at R.-FPC. 111-128.

and Electric & Gas had evidenced interest in the acquisition of the shares in Power (R.-SEC. 153, 162, 166-173). Negotiations between Authority and Commonwealth failed because Authority refused to accept the restrictive conditions sought to be imposed by Commonwealth, Commonwealth doubted Authority's power to purchase the stock, and Commonwealth was desirous of avoiding "a competitive publicly operated threat to the neighboring southern companies remaining subsidiaries of this corporation" (R.-FPC. 5, 87-91, R.-SEC. 196-197). Accordingly, notwithstanding Authority's higher offer of $11,600,000, which was subject to obtaining an underwriting, which in turn was subject to securing a ruling from the courts of South Carolina that Authority had power under South Carolina law to acquire the stock, Commonwealth contracted to sell the stock to Electric & Gas for a price of $10,200,000 subject to closing adjustments (R.-FPC. 5, 33-37, 47-56, 106-109).

The proposed sale of stock by Commonwealth to Electric & Gas involved three distinct but related transactions, each requiring a regulatory agency's approval: (1) the disposition of the stock by Commonwealth, a registered holding company, was subject to the Securities and Exchange Commission's approval under Section 12(d) of the Public Utility Holding Company Act; (2) the acquisition of the stock by Electric & Gas, a public utility under the Federal Power Act, required the Federal Power

Commission's approval under Section 203 of that Act;[4] and (3) the issuance of securities by Electric & Gas to finance the acquisition required the South Carolina Public Service Commission's approval.

The South Carolina Public Service Commission, on November 6 and December 23, 1947, approved Electric & Gas' application for authority to issue securities to finance the acquisition of the stock (R.-FPC. 2-3, 102-105). In so approving, that Commission found that as a result of the acquisition, Electric & Gas would be in a stronger financial position, that together the two companies would have sufficient generating facilities to provide an adequate power supply to serve both territories in the near future, and that Electric & Gas would have sufficient credit and financial strength to obtain any funds necessary for further expansion (R.-FPC. 103-104). It further was of the opinion that the acquisition would not prejudice customers of Power as to rates (R.-FPC. 104). An appeal by certain "objectants" to the Court of Common Pleas, Richland County, South Carolina, was dismissed on April 3, 1948, and an appeal to the South Carolina Supreme Court was dismissed on May 14, 1948 (R.-FPC. 301).

On March 25, 1948, the Securities and Exchange Commission approved Commonwealth's disposition of the stock to Electric & Gas (R.-SEC. 26-

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[4] Cf. *Jersey Central Co.* v. *Federal Power Commission*, 319 U. S. 61, 72-78.

29).[5] It found that there were only two interested purchasers and that one of these, Authority, required judicial clarification of its right to buy the stock. As to the latter circumstance, it noted that *Creech* v. *South Carolina Public Service Authority,* 200 S. C. 127, cast doubt on Authority's power to acquire the common stock of Power (R.-SEC. 14-17), that underwriters had advised the Authority of their unwillingness to purchase and distribute the Authority's bonds until this doubt had been removed through a court test (R.-SEC. 17), that a substantial period of time might be necessary to resolve that doubt (R-.SEC. 17-18, 19, 20), and that Authority's failure to receive a prompt and favorable decision might well result in Electric & Gas' being the only bidder (R.-SEC. 20). This, the Commission found, would not only injure Commonwealth's bargaining power in any subsequent negotiations but would involve cash stringency in view of the pending construction program of the Commonwealth system (R.-SEC. 20). It further noted that Authority's objections to the proposed transaction on the grounds that it was not in the public interest, or for the benefit of consumers or

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[5] Commonwealth's application for approval was filed under Section 12(d) of the Holding Company Act and SEC Rule U-44. Application was also made for exemption from the competitive bidding requirements of Rule U-50.

The application was also filed as a plan under Section 11(e) of the Holding Company Act, and the plan was approved by the SEC as "fair and equitable" within the meaning of that Section.

investors, were made before, and rejected by, the South Carolina Commission (R.-SEC. 21-22). It granted the requested exemption from the competitive bidding requirements of its Rule U-50(b) and approved the proposed disposition of the Power stock by Commonwealth, finding that the management of Commonwealth was warranted in accepting the offer of Electric & Gas, that the public invitation of sealed bids was inappropriate, and that the price offered by Electric & Gas was not unreasonable (R.-SEC. 2-25). The SEC stated that nothing in its decision was to be construed as affecting or limiting the jurisdiction of the Federal Power Commission (R.-SEC. 22).

Meanwhile, on November 19, 1947, Electric & Gas applied to the Federal Power Commission for authorization and approval of its acquisition of Power's stock (R.-FPC. 2). The Authority, the Federal Works Agency, and the City Council of Charleston, South Carolina were allowed to intervene (R.-FPC. 2-3). The records in the proceedings before the State Commission and the Securities and Exchange Commission were, by agreement of counsel, incorporated in, and made part of, the Federal Power Commission's record (R.-FPC. 3). On this record, the Federal Power Commission, on April 29, 1948, made the finding required by the statute that the acquisition was "consistent with the public interest" and granted Electric & Gas'

application. In reaching that result, it found (R.-FPC. 8-9):

> The systems of [Electric & Gas] and the Power Company are interconnected and their operation will be integrated as a result of the stock acquisition. Integration of the properties will permit more efficient and better utilization of existing transmission facilities. Completion of construction initiated by the Power Company will create an additional transmission line so as to enable loop operation between the eastern and western load centers of the integrated properties. Additional operating benefits and economies can flow from the use of the most efficient steam plants to carry the base load, thereby permitting accumulation of storage in hydro projects to carry peak loads. Integration of the properties will diminish the reserve capacity required to maintain service, as the indicated reserve required for the integrated properties would be practically the same as that for the separate properties independently operated. It is reasonable to conclude that some benefits may be derived from the consummation of the proposed acquisition.

It noted that by an amendment to the application, Electric & Gas undertook to write off, by charges to earned surplus and future earnings, the excess of the amount it would pay for the stock over the original cost (less depreciation) of the underlying assets.

As to Authority's contention that Electric & Gas' application should be denied because of Authority's alleged superior offer, the Commission noted that it had only limited jurisdiction in the premises, *i.e.*, that the statutory standard provided in Section 203(a) was that the proposed acquisition merely be "consistent with the public interest," and commented (R.-FPC. 7):

> Granted such a proposal, or some other plan not presently before us, might be better in certain aspects, nevertheless that fact is insufficient to support a finding that the proposal formally before us is not consistent with the public interest.

Authority's application for rehearing being deemed denied by reason of the Power Commission's failure to act thereon within thirty days after filing, Authority petitioned the court below for review of the Commission's order together with that of the Securities and Exchange Commission (R.-FPC. 273-283, R.-SEC. 261-274). That court was of the opinion that both the Federal Power Commission and the Securities and Exchange Commission had fully considered Authority's various contentions and had found nothing in them requiring that the sale to Electric & Gas be disapproved. It further held that "There is abundant evidence that the sale is fair to all parties, that it will result in divesting Commonwealth and Southern of all control over the property and that the ownership

by Electric and Gas is consistent with the proper and economical development of an adequate supply of electrical energy in the territory. Under such circumstances we are bound by the findings of the Commissions approving the sale and purchase as in the public interest" (R.-FPC. 330). Accordingly, it affirmed (R.-FPC. 330).[6]

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[6] At the same time that it affirmed the orders of the SEC and of the FPC, the court below denied motions made by Commonwealth in the SEC case and by Electric & Gas in the FPC case that the petitions for review be dismissed for mootness (R.-FPC. 330). The petitioner had made no application to the court below for a stay, and the companies, almost two months after entry of the SEC's order, had proceeded to consummate the transaction. This involved not only a transfer of the Power Company to Electric & Gas, but also, since Electric & Gas needed to raise some of the necessary funds through a public offering of securities, it sold some $6,000,000 in new stock to thousands of investors upon the basis of a prospectus which described the purpose of the financing to be the acquisition of the Power Company (R.-SEC. 283-99).

The private companies argued that under the circumstances the controversy was moot. The SEC, on the other hand, expressed the view that the mere consummation, in the absence of a stay, of a transaction requiring Commission authorization does not preclude a reviewing court from ordering restoration of the status quo where the administrative authorization is found to be improvident and such relief is practicable and consistent with the equities of the case; under the facts then before the Court, however, the SEC argued that even if its order were deemed erroneous the court should not undertake to undo the transaction in view of the fact that the rights of innocent third parties had intervened in such a way that there appeared to be no practical and equitable method of restoring the status quo. Since the court found the orders of the two Commissions to be proper, it did not reach this question, holding only, as we understand its opinion, that consummation did not deprive it of jurisdiction to affirm. With this holding we, of course, agree.

ARGUMENT

The petition here is premised on the assumption that the Authority offered an alternative proposal to purchase the stock of Power more beneficial to the public interest. But no such superior alternative in fact existed. The South Carolina Supreme Court in *Creech* v. *South Carolina Public Service Authority,* 200 S. C. 127, at the very least had cast substantial doubt on Authority's power to purchase the stock, and, indeed, as read by the court below (R.-FPC. 326-329), that decision denies any such power to Authority. Neither the SEC nor the court below purported to decide the state law; the issue before them was merely one of fact—or judgment—as to whether the state law was doubtful with respect to the Authority's power to buy. The suggestion now made by the petitioner (Pet. 38) that the issue of state law should have been left to decision by the state courts in a test case simply begs the issue of fact (or judgment) which was before the SEC: whether the chance that such a course would result in a ruling upholding the Authority's power to purchase the stock in question was sufficient to warrant rejection of Commonwealth's proposal for authorization to accept the only firm offer—that of Electric and Gas.

Not only was an alternative purchaser not available immediately (the South Carolina Supreme Court, as the court below and the SEC recognized

(R.-SEC. 313-315), might, of course, have reversed, modified or distinguished its holding in subsequent litigation), but in addition, it is clear that Commonwealth was not willing to sell the stock to Authority. While there had been prior negotiations between Authority and Commonwealth involving offers and counter-offers, all subject to seeking additional judicial declarations as to Authority's power to purchase the stock, these offers had not resulted in any contract or concrete proposal. Commonwealth finally had refused to sell to Authority both because of doubt as to Authority's legal capacity to purchase and because Authority is a public power authority and an agency of the State of South Carolina. The so-called "superior proposal" was nothing more than, on the one hand, a desire to purchase on the part of Authority which had, at best, doubtful power to make the purchase, and, on the other, no reciprocal desire on the part of Commonwealth to make the sale.

1. In the light of the facts that the SEC did not have before it for consideration any real and immediate alternative to the sale by Commonwealth to Electric & Gas, and that the South Carolina Public Service Commission, on a record which was made part of the record before the SEC (R.-SEC. 22, note 21), had, after lengthy hearings, approved the purchase by Electric & Gas of Power's common stock and the issuance of securities to finance the purchase in the face of the same objections as are

now made by the Authority, it is perfectly clear that the SEC acted well within its discretion when it approved the proposed sale.[7]

That the Commonwealth management was motivated, in part, by the desire to avoid public ownership competition to its subsidiaries in adjoining States (Pet. 6-7) was not a fact which precluded SEC approval of the sale to Electric and Gas. As the SEC concluded in its Findings and Opinion (R.-SEC. 19), it was not called upon to "approve or disapprove the management's reasons for fol-

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[7] The SEC's Rule U-50, promulgated in part under Section 12(d), provides that a registered holding company or subsidiary thereof, desiring to sell securities, shall publicly invite sealed written bids for the purchase or underwriting of such securities. An exemption from the Rule is available where such procedure is not necessary, *inter alia*, "to assure the maintenance of competitive conditions" or "the receipt of adequate consideration." Under the circumstances of this case, as the SEC held (R.-SEC. 12-14), the device of publicly inviting sealed bids was obviously unnecessary to fulfill the purposes of the Rule or of Section 12(d). It is undisputed that, despite advance publicity of Commonwealth's intention to dispose of its interest in Power, the only interested purchasers were the Authority and Electric & Gas. In effect, the bids were already in, and the only question was whether Commonwealth should be compelled to surrender a "bird in the hand" for a "bird in the bush." There is nothing in the Rule requiring acceptance of a high bid notwithstanding doubt as to the bidder's legal capacity to consummate the transaction, and the Commission has never so construed it.

In actual practice under Rule U-50, a seller requires prospective bidders to submit in advance of the actual bidding certain data from which an appraisal may be made of their qualifications to bid. When the bids are in, the seller chooses what it deems the highest qualified bidder, subject to the surveillance of the SEC, which uniformly reserves jurisdiction in Holding Company Act proceedings to pass upon the results of competitive bidding. Thus, had the machinery of formal competitive bidding actually been used in this case, the consequences would have been no different.

lowing one course of action rather than another. Whatever questions we may have as to Commonwealth's motivation, the problem before us is whether the facts of record indicate compliance or noncompliance with the applicable statutory requirements." See Section 12(d) of the Holding Company Act, Appendix, *infra*, p. 26. Any other rule would render unworkable a statute which subjects to SEC jurisdiction virtually every significant financial transaction on the part of a public utility holding company or a subsidiary. Since it was objectively ascertainable on the record that there was a serious question as to the petitioner's authority to buy, and since the South Carolina Public Service Commission had approved the transaction, the SEC's determination, that the decision of Commonwealth's management to accept the Electric & Gas offer did not violate any standards of the Act, is invulnerable.

The practical situation which confronted the SEC and the court below, and which now confronts this Court, makes it unnecessary to consider the nature of the SEC's duty under Section 12(d) of the Holding Company Act, much discussed by the Authority (Pet. 28-32). The SEC did not, as the Authority contends, ignore the interests of the public and consumers. In stating that its decision was without prejudice to consideration by the Federal Power Commission of whether the proposed acquisition is in the public interest, the SEC did not abdicate its function of considering the

public interest as it would be affected by the proposed sale.[8] Its reference to the hearings before, and decision by, the South Carolina Public Service Commission (R.-SEC. 21-22) was obviously made in response to the Authority's arguments in this connection. It felt impelled to do no more because of its "grave doubt concerning the Authority's ability to acquire the common stock of Power" (R.-SEC. 19), and that administrative judgment was within its discretionary power. That the proposed sale was not in disregard of the interests of the public and the consumers appeared from the decision of the South Carolina Public Service Commission. The SEC was thus free, under the circumstances, to treat the problem as one in which at least minimal protection to those interests was sufficient basis for approval when withholding approval would result in "real danger to Commonwealth" (R.-SEC. 19).[9]

2. Much the same considerations serve to dispose of the Authority's attack on the order of the Federal Power Commission (Pet. 33-37). Whether the

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[8] The SEC certainly did not abuse its discretion in leaving the FPC free to consider the effect of the proposed acquisition on the public interest. Electric & Gas was not subject to the SEC's jurisdiction and was, as a public utility company, subject to that of the FPC. As we show, *infra*, pp. 17-18, the FPC gave full and complete consideration to the public interest as it impinged upon the acquisition.

[9] Cf. *Federal Communications Commission* v. *WOKO*, 329 U.S. 223, 228-229; *National Labor Relations Board* v. *Donnelly Co.*, 330 U.S. 219, 235; *Pittsburgh Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 156-163; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50.

Federal Power Act requires the Commission to weigh alternative proposals and choose the more advantageous to the public is certainly not involved in this case for, as we have shown, there was no real and immediate alternative to Electric & Gas' offer to purchase.[10]

We do not understand the Authority to quarrel with the Power Commission's position that it is not obliged to weigh the merits of a proposed plan with others which might have been, or might be, but were not, actually real alternatives. If it means nothing else, the decision of the Court of Appeals for the Ninth Circuit in *Pacific Power & Light Company* v. *Federal Power Commission*, 111 F. 2d 1014, 1016, holding that "The phrase 'consistent with the public interest' [in Section 203(a) of the Power Act] does not connote a public benefit to be derived or suggest the idea of a promotion of the public interest. The thought conveyed is merely one of compatibility", means that the Power Commission is not obliged to decide that the proposed plan is the best of all conceivable, albeit unavailable plans.

In this case, the Power Commission not only found that the proposed transaction would be "consistent with the public interest"; it went further and found that affirmative benefits would result (R.-FPC. 8-9). See, *supra*, pp. 8-10. In so doing,

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[10] The illusory nature of an alternative purchase by Authority was underlined for the Federal Power Commission by the fact that the SEC had not approved a sale to Authority.

the Commission rejected Authority's contention, previously advanced before, and rejected by the South Carolina Commission (R.-FPC. 103-104) and renewed here again (Pet. 31, 33), that the record "showed overwhelmingly that the effect of this transfer" would result in impairment of a public utility's ability to render adequate service. This contention is premised on the existence of a claimed "superior proposal", but that illusory proposal aside, Authority does not question, and the court below found (R.-FPC. 330), that the Commission's findings are supported by substantial evidence. Accordingly, these findings, including the finding of resulting affirmative benefits, were properly treated by the court below as conclusive and binding. Section 313(b) of the Federal Power Act, Appendix, *infra*, pp. 23-25; see also *Ayrshire Corp.* v. *United States*, 335 U. S. 573, 592-593; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596, 597.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for writs of certiorari should be denied.

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MARCH, 1949.

APPENDIX

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, as amended by, 49 Stat. 838, 16 U.S.C. 791 a—825 r, are as follows:

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the gen-

eration of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 203. (a) No public utility shall sell, lease, or otherwise dispose of the whole of its

facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding

under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the

court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to re-

view by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

The pertinent provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79, *et seq.*, are as follows:

SEC. 11(e). In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate

the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan * * *.

SEC. 12(d). It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

SEC. 24(a). Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof de-

signated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order

of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Rule U-44, promulgated under Section 12 (d) of the Act, as well as under other sections not here relevant, provides in pertinent part as follows:

(a) *Sales of utility securities or assets.*—No registered holding company shall, directly or indirectly, sell to any person any security which it owns of any public-utility company, or any utility assets, except pursuant to a declaration notifying the Commission of the proposed transaction, which has become effective in accordance with the procedure specified in rule U-23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act.

Rule U-50, promulgated under Section 12 (d) of the Act, as well as under other sections not here relevant, provides in pertinent part as follows:

(a) *Scope of rule.*—This rule is applicable to every declaration and application regarding the issuance or sale of any securities of, or owned by, any registered holding company or subsidiary company thereof except * * * (5)

The issuance or sale of securities as to which the Commission finds that compliance with paragraphs (b) and (c) hereof with respect to such issuance or sale is not * * * (c) necessary or appropriate in the public interest or for the protection of investors or consumers to assure the maintenance of competitive conditions, the receipt of adequate consideration or the reasonableness of any fees or commissions to be paid with respect to sales of securities subject to section 12 (d) of the Act.

(b) *Public invitation of proposals.*—The Commission will not grant or permit to become effective any application or declaration subject to this rule unless the applicant or declarant, at least 10 days prior to entering into any contract or agreement for the issuance or sale of the securities therein proposed, shall have publicly invited sealed written proposals for the purchase or underwriting of such securities and has complied with paragraph (c) hereof. Such proposals as may be received in response to such invitation shall not be opened at any time or place other than as specified in the invitation.

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